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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-608

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W. PETER CAREY, ET AL., *Petitioners,*

v.

J. J. O'DONNELL, President of the Air Line Pilots Association, ET AL., *Respondents*

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GEORGE S. CHAUDOIN, ET AL., *Petitioners,*

v.

AIR LINE PILOTS ASSOCIATION, ET AL., *Respondents*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-7a), and the opinions of the district courts (Pet. 8a-12a) are not yet reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 19, 1974 (Pet. 2), and petitioners' request for rehearing *en banc* was denied on November 1, 1974 (Pet. 13a). The petition for a writ of certiorari was filed on November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

The Federal Aviation Act of 1958 authorizes the Civil Aeronautics Board to condition its approval of air line mergers upon the imposition and maintenance of conditions designed to protect the public interest, including a condition requiring that employee seniority lists be integrated in a fair and equitable manner. Exclusive jurisdiction to review such Board orders is vested in the courts of appeals.

The question presented is whether employees aggrieved by such a merged seniority list may invoke district court jurisdiction to invalidate the list after the Board itself has rejected their challenge.

## STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra,* pp. 1a-3a and at Pet. 14a-15a.

## STATEMENT OF THE CASE

### A. Background

In the spring of 1972, the Civil Aeronautics Board approved the carriers' joint application for a merger of Northeast Airlines, Inc. (("Northeast") and Delta Air Lines, Inc. ("Delta") (Pet. 2). Consistent with its usual practice, the Board conditioned the merger upon the surviving carrier's acceptance of certain

provisions designed to protect affected employees. In particular, the Board directed that "provisions shall be made for the integration of [the previously-separate Delta and Northeast] seniority lists in a fair and equitable manner . . . ." The Board also expressly reserved jurisdiction to make future modifications in the employee protective conditions "as the circumstances may require" (J. A. 64-65, 184; Carey J. A. 26).[1]

Meanwhile, Respondent ALPA—the recognized bargaining representative for all pilots employed by both carriers—had already invoked its own mandatory internal procedures for seniority integration. Section XII of the ALPA Policy Manual provides specific guidelines for integrating pilot seniority lists when a merger so requires (J. A. 191-196). Each affected airline group is required to designate two pilot representatives for the purpose of attempting to negotiate a single integrated list; if their direct negotiations do not culminate in agreement, ALPA's President J. J. O'Donnell is authorized to invoke mediation or, ultimately, final and binding arbitration.

Section XII negotiations between Delta and Northeast pilot Merger Representatives began in the summer of 1971 and culminated in complete agreement on June 5, 1972 (J. A. 186; Carey J. A. 28). Thereafter, in accordance with its procedures, ALPA transmitted the June 1972 list to Delta management with a request for negotiation and adoption. By terms of an October 26, 1972, collective bargaining agreement, Delta agreed to

[1] Two separate cases were consolidated in the court of appeals. "J.A." refers to the joint appendix in *Chaudoin* v. *ALPA*, No. 73-1783. "Carey J.A." refers to pages of the joint appendix in *Carey* v. *O'Donnell*, No. 73-1608.

adopt the June 1972 seniority list and to modify its preexisting collective bargaining agreement with ALPA so as to permit the new list's implementation.

Shortly after the pilot Merger Representatives had negotiated and published the integrated list, in June 1972, the Northeast Master Executive Council ("MEC") conducted a special meeting at which it decided to "repudiate" the integrated list.[2] President O'Donnell was then urged to reject the integrated list, primarily upon the grounds that it was unacceptable to the seven-member MEC; O'Donnell, by letter dated August 1, 1972, declined (Pet. 3; J. A. 186-187, 204-208; Carey J. A. 29). As his letter explained, it is the Merger Representatives, not the MEC, who have complete and full authority to compile a merged list under ALPA merger policy. Once Merger Representatives have reached agreement, it was explained, no authority existed in the MEC to alter its terms (J. A. 207).

On October 4, 1972, the MEC invoked the jurisdiction of the Civil Aeronautics Board in an effort to void the integrated seniority list. The MEC petitioned the Board to exercise its reserved jurisdiction over the implementation of labor protective conditions on the grounds that the June 1972 list was "unfair" to Northeast pilots, that its terms had been repudiated by the MEC, and that the Northeast Merger Representatives should not have agreed to the list but should have acted instead pursuant to alleged limiting instructions from the MEC (J. A. 126-133). On January 10, 1973, the Board dismissed the MEC's petition (J. A. 184-190;

[2] Under ALPA's Constitution, a Master Executive Council ("MEC") is established as an administrative subdivision of ALPA; on each airline, pilots elect their own MEC (J.A. 185, n.2).

Carey J. A. 26-32). Based upon the undisputed facts, the Board concluded, no case had been spelled out warranting Board intervention.

The MEC subsequently filed a petition for review of that Board determination. *Northeast Master Executive Council* v. *CAB, et al.*, No. 73-1595. The U. S. Court of Appeals for the District of Columbia Circuit affirmed the Board's order on August 19, 1974. A petition for a writ of certiorari (No. 74-610) to review that judgment was also filed on November 18, 1974.

### B. District Court Proceedings

#### *1. Carey*

On April 2, 1973, ALPA was served with a complaint (J. A. 231-236) seeking an injunction against further implementation of the merged seniority list, and damages of $75,000,000. *W. Peter Carey, et al.* v. *J. J. O'Donnell and ALPA,* Civil Action No. 609-73. The nominal plaintiffs in *Carey* were five former Northeast pilots, now employed by Delta, who sued on their own behalf and on behalf of all other former Northeast pilots now employed by Delta (J. A. 232; Carey J. A. 5).

The *Carey* complaint alleged that ALPA and O'Donnell had violated plaintiffs' Railway Labor Act ("RLA") rights by executing the October 26 agreement with Delta which embodied and implemented the merged seniority list (J.A. 232-234; Carey J.A. 6-7). Specifically, it was alleged that agreement discriminated unlawfully against former Northeast pilots and in favor of Delta pilots because ALPA and O'Donnell were, for reasons not disclosed, "hostile" to the Northeast pilots (J.A. 234; Carey J.A. 7).

On May 1, 1973, the Court granted the ALPA's motion to dismiss on the grounds that "exclusive jurisdiction over this controversy lies with the Civil Aeronautics Board . . ." (Pet. 4; J.A. 236; Carey J.A. 88).

*2. Chaudoin*

At about the same time, ALPA was served with yet another federal court complaint. *Chaudoin, et al.* v. *Air Line Pilots Association and Delta Air Lines, Inc.*, Civil Action No. 752-73 (J.A. 3-6). Like the prior action, *Chaudoin* was also brought (a) as a class action on behalf of the former Northeast pilots now employed by Delta and (b) to invalidate the integrated seniority list and the collective bargaining agreement which gives it effect (J.A. 6). Unlike *Carey*, however, plaintiffs in *Chaudoin* invoked the Age Discrimination in Employment Act (ADEA), 29 U.S.C., Section 623, *et seq.* in support of their claims of unfairness and discrimination.

On June 15, 1973, the district court issued a Memorandum and Order granting defendants' motion to dismiss. The doctrine of *res judicata*, the court held, barred the plaintiffs in *Chaudoin* from relitigating the holding of the court in *Carey*. Accordingly, the conclusion of the *Carey* court that exclusive jurisdiction over the subject matter lay with CAB was held binding upon plaintiffs in *Chaudoin* (J.A. 253-256).

**C. Decision of the Court of Appeals**

The court of appeals consolidated both cases and affirmed the judgments of dismissal:

> "Viewed objectively, the actions below, although couched in terms of violations of the RLA and the ADEA, are essentially collateral attacks on

> the integrated seniority list . . . approved by the Civil Aeronautics Board, and reviewed by this court in *Northeast Master Executive Council* [v. *CAB,* No. 73-1595]. We perceive no necessity for additional review, not contemplated by the Federal Aviation Act, in the District Court or any other forum." (Pet. 6a).

Having concluded that exclusive jurisdiction over these controversies lay with the Board, the court of appeals declined to reach the *res judicata* questions presented in *Chaudoin,* or other defenses (Pet. 7a).

## ARGUMENT

The decision of the court of appeals is correct, and there is no conflict of decisions. Further review is not warranted.

The Federal Aviation Act of 1958 plainly manifests a Congressional intention to centralize the supervision of airline mergers, and to vest the Civil Aeronautics Board with broad authority—subject only to limited review in a court of appeals—to determine questions concerning the parties' compliance with the terms of the merger.

Thus, Section 408 prohibits air carrier mergers without prior Board approval, and authorizes the Board to condition its approval upon compliance with provisions aimed at protecting the public interest, including provisions requiring the fair and equitable integration of the previously separate seniority lists. Once the Board has issued an order under Section 408, the parties affected are subsequently relieved of all other legal restraints to the extent necessary for them "to do anything authorized, approved, or required by such order." Section 414. Furthermore, Section

1006(a) and (d) vests "exclusive jurisdiction" to review Board orders in the courts of appeals.

Accordingly, any exercise of district court jurisdiction over the *Carey* and *Chaudoin* complaints would have undermined the Congressional design, diluted CAB's regulatory authority and subjected the merger itself to the risk of potentially conflicting judgments. For those complaints aimed clearly at invalidating the same integrated pilot seniority list which CAB itself had initially directed the merger parties to compile, and subsequently approved.

Petitioners dispute none of the foregoing propositions, but seek review and reversal here on essentially two grounds. First, petitioners contend (Pet. 5-6, 13) that the district courts were compelled to exercise jurisdiction because the complaints asserted a "controversy [which] . . . arises under the . . . laws . . . of the United States", within the meaning of 28 U.S.C. 1331(a). This reflects a misconception of the rationale of the court of appeals.

The question below was not whether the complaints described a matter within the cognizance of a federal court at all. Compare *Bell* v. *Hood*, 327 U.S. 678 (1946). Rather, the question was whether a district court may adjudicate a matter which Congress has expressly committed to agency control, subject only to review in the courts of appeals.

That question was answered correctly here, in conformity with settled principles. Whatever might be said of complaints about a seniority merger undertaken outside the scope of CAB control and surveillance, see *Humphrey* v. *Moore*, 375 U.S. 335 (1964), the agency action here effectively precluded any inde-

pendent district court challenge to the merged seniority list.

In comparable situations, this Court itself has consistently refused to sanction any collateral attack upon agency orders issued pursuant to the Federal Aviation Act, or pursuant to other statutes similarly providing for limited agency action review. *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 389 (1973); *Marine Terminal* v. *Rederi. Transatlantic*, 400 U.S. 62, 69-72 (1970); *Consolo* v. *F.M.C.*, 383 U.S. 607, 613 (1966); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420-22 (1965); *City of Tacoma* v. *Taxpayers of Tacoma, et al*, 357 U.S. 320 (1958); *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 511-13 (1953); *United States* v. *Corrick*, 298 U.S. 435 (1936); *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-82 (1922); and see *Order of Railway Conductors* v. *Pennsylvania R.R. Co.*, 323 U.S. 166 (1944).[3] Moreover, in reliance upon that rationale, all of the courts which have considered the question agree that CAB has exclusive jurisdiction over employee complaints about

[3] In the lower federal courts, the rule against collateral attacks is likewise settled. *Taylor County Sand Co.* v. *Seaboard Coast Line R. Co.*, 446 F.2d 853 (5th Cir. 1971); *Smith Steel* v. *A. O. Smith Corp.*, 420 F.2d 1, 7 (7th Cir. 1969); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966); *McGuire* v. *Humble Oil & Refining Co.*, 355 F.2d 352, 357 (2d Cir. 1966), certiorari denied, 384 U.S. 988; *Roberts* v. *Lehigh & New England Ry.*, 323 F.2d 219, 222 (3rd Cir. 1963); *Operating Engineers, Local 148* v. *Operating Engineers, Local 2*, 173 F.2d 557, 559 (8th Cir. 1949); *Amazon Cotton Mills Co.* v. *Textile Wkrs. Union*, 167 F.2d 183 (4th Cir. 1948); *Int'l Longshoremen's etc., Local 6* v. *Sunset Line and Twine Co.*, 77 F. Supp. 119, 123 (N.D. Calif., 1948); *Great Western Broadcasting Corp.* v. *Hoffman*, 214 F. Supp. 173, 176-177 (N.D. Calif., 1963).

seniority lists compiled as a condition of an airline merger. *Kesinger* v. *United Airlines, Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973); *Oling* v. *Air Line Pilots Ass'n.*, 346 F.2d 270 (7th Cir. 1965) certiorari denied, 382 U.S. 926 (1965); *Hyland* v. *United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill., 1966); *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga., 1962); *Northeast MEC* v. *O'Donnell*, — F. Supp. —, 81 LRRM 2731 (D.C.D.C., 1972).

In all of these cases, too, the complaints adequately described an applicable federal law otherwise sufficient to invoke a district court's authority. But where, as here, the subject matter of the complaint was within the scope of an exclusive review procedure, the courts uniformly defer to that procedure and decline to sanction any collateral attack.

Petitioners' second asserted basis for avoiding this settled rule fares no better, and, indeed, is largely a restatement of the first. According to petitioners, their complaints involved "much more than simply the integration of seniority lists" (Pet. 9) and therefore provided a basis for independent district court action, as did the complaints in *S.S.W. Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 658 (D.C. Cir., 1951), certiorari denied, 343 U.S. 955 (1952); and *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968), certiorari denied, 393 U.S. 846 (1968).

But petitioners' complaints did not allege any wrongdoing except for the compilation of an integrated seniority list and the execution of the collective bargaining agreement which gave it effect (J.A. 3-6; 231-236). In these circumstances, the subject matter of the complaints is identical to the subject matter vested

in CAB and the court of appeals; there is no independent basis for district court action. *S.S.W.*, and *Allied, supra,* are distinguishable because the disputed conduct there had never been the subject of a prior Board approval order, and therefore did not qualify for Section 414 immunity and exclusive review in a court of appeals. Compare *Hughes Tool Co., supra.*

Finally, *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974) and *Macklin* v. *Spector Motor Freight Systems, Inc.,* 478 F.2d 979 (1973) are also inapposite. Both cases arose under the Civil Rights Act of 1964, 42 U.S.C. Section 1981, a statute not invoked here. None of the references there to the propriety of parallel or overlapping remedies (415 U.S. at 43) were aimed at the RLA or the ADEA, upon which petitioners relied. Moreover, neither case involved a collateral attack upon the order of a government agency. District court jurisdiction in the cited cases was upheld despite the plaintiffs' prior submission of discrimination claims to an arbitrator selected pursuant to a collective bargaining agreement. This Court's explanation, in *Alexander,* of the special reasons why private arbitration is an inappropriate forum for the final resolution of Title VII rights have no application to CAB.

Thus, the arbitrator, unlike CAB, has an obligation to "follow the agreement" rather than to enforce public law and, unlike CAB, is chosen by the parties because of his specialized competence in discerning the "law of the shop". CAB procedures, on the other hand, can provide the formality and compulsory process of judicial fact-finding, and CAB's commitment to a "fair and equitable" seniority list, as a

matter of public law, assures that a showing of *any* form of invidious discrimination will evoke an agency response.[4]

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY GREEN
*Attorney for Respondents*

December 1974.

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[4] See, e.g., *North Atlantic Route Transfer Case*, 12 CAB 422, 424; 14 CAB 910 (1951); *Braniff-Mid Continent Merger Case*, 17 CAB 19 (1953); *American -Trans Caribbean Merger Case*, CAB Order 71-5-30, Docket 21028 (May 7, 1971), aff'd *sub nom. American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir., 1971), certiorari denied, 404 U.S. 1015 (1972).

# APPENDIX

The relevant portions of the Federal Aviation Act of 1958, as amended, 72 Stat. 737, 49 U.S.C. 1301, *et seq.* are:

## CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

### Acts Prohibited

*Sec. 408(a)*

It shall be unlawful unless approved by order of the Board as provided in this section—

> (1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;
>
> * * *

### Power of Board

*Sec. 408(b)*

Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeoparadize another air carrier not a party to the consoli-

dation, merger, purchase, lease, operating contract, or acquisition of control:

* * *

LEGAL RESTRAINTS

*Sec. 414*

Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, an is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

* * *

JUDICIAL REVIEW OF ORDERS

*Sec. 1006*

(a) Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

*Venue*

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Secretary of Transportation by the Clerk of the Court, and the Board or Secretary of Transportation shall thereupon file in the court the

record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

*Power of Court*

(d) Upon transmittal of the petition to the Board or Secretary of Transportation, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Secretary of Transportation. Upon good cause shown and after reasonable notice to the Board or Secretary of Transportation, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

*Findings of Fact Conclusive*

(e) The findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or if it was not so urged, unless there were reasonable grounds for failure to do so.

*Certification or Certiorari*

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Secretary of Transportation shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.